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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/830,000	04/23/2004	Stephan Ruppert	P25114	7654

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EXAMINER

YU, GINA C

ART UNIT	PAPER NUMBER
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1617

NOTIFICATION DATE	DELIVERY MODE
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07/05/2007

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 10/830,000	Applicant(s) RUPPERT ET AL.	
	Examiner Gina C. Yu	Art Unit 1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 April 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 13-23, 26-40 and 44-56 is/are pending in the application.
- 4a) Of the above claim(s) 18-23, 27, 50 and 51 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 13-17, 26, 28-40, 44-49, 52-56 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Receipt is acknowledged of amendment filed on April 3, 2007. Claims 13-23, 26-40, and 44-56 are pending, of which claims 18-23, 27, 50, and 51 are withdrawn from consideration. Claim rejections made under 35 U.S.C. § 103 (a) as indicated in the previous Office action dated February 27, 2007, are withdrawn in view of the claim amendment made by applicants. New rejections are made. Applicants' request to hold the obviousness double patenting rejection in abeyance until allowable subject matter is indicated is noted. The rejection is maintained for formality and for record.

Claim Objections

Claim 27, currently amended, has been withdrawn from consideration as the claim contains non-elected species. Appropriate correction is required to indicate the proper claim status.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 13-17, 26, 30-40, 44-49, 54 and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Touzan et al (US 6210656 B1) in view of Giacomoni (US 7083799 B1) and Dixon et al. (US 5869070).

Touzan teaches a self-foaming cleansing cream formulation comprising (a) 1.5 % by weight of sodium laureth sulfate; (b) 10 % by weight of mineral oil and 10 % of octyl palmitate; (c) 3 % by weight of glycerol (active agent); and (d) 0.6 % by weight of Carbomer (acrylic acid polymer) and 0.2 % by weight of acrylate/C10-C30 alkylacrylate crosspolymer (Pemulen). See Example 3; col. 2, lines 26 – 56; col. 3, lines 44 – 52;

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instant claims 13-17, 26, 33-35, 45, and 49. Sodium laureth sulfate meets claims 14 and 15, as admitted by applicants. Example 1, which is also a self-foaming cleansing cream comprising 1 % of sodium laureth sulfate, teaches using 6 % of glycerol. See instant claims 30 and 32. In claims 45-48, the terms "bath" "shower bath", "tub bath", and "hair shampoo" denote the intended future use, and does not further define the structural limitation of the composition of instant claim 13. Thus no patentable weight is given to these terms. See MPEP § 2111.02.

While Touzan's formulation in Example 3 contains 20 % of oil, the specification teaches in col. 5, lines 47 – 61 that the composition may comprise up to 50 % of an oil phase. A preferred weight range for the oil phase is from 5-40 %.

While Touzan further teaches using the cleansing composition for sensitive skin, the reference fails to teach NO (nitric oxide) -synthase inhibitors. See col. 7, lines 3-5.

Giacomoni teaches using an effective amount of nitric oxide synthase inhibitors in a cosmetic composition such as foam, cleansing creams for skin. See abstract; col. 4, lines 40-54. The reference teaches that NO-synthase inhibitors reduce the skin irritation effect of topically applied cosmetic or pharmaceutical substances, such as ionic detergents. See col. 3, lines –12. See instant claim 31.

It would have been obvious to one of ordinary skill in the art at the time of the present invention to modify the composition of Touzan by incorporating NO-synthase inhibitors, as motivated by Giacomoni, because 1) Touzan is concerned with treating sensitive skin; and 2) Giacomoni teaches that skin irritant effect of ionic detergents can be further reduced by adding NO-synthase inhibitors to topical compositions. The skilled artisan would have had a reasonable expectation of successfully producing a

stable cleansing composition which does not irritate skin, since Giacomoni teaches that NO-synthase inhibitors are used in emulsions and foam compositions.

Although Touzan limits the amount of surfactants to 2 % for the users of sensitive skin, Giacomoni teaches the method of reducing skin irritation caused by detergents.

Dixon teaches a skin cleansing and moisturizing composition comprising about 5-30 parts of lipid skin moisturizing agents; 0.3-5 parts of a water dispersible gel forming polymer; and from about 5-30 parts of a synthetic surfactant; and water. Examples 1 and 2 on column 17 show stabilized polymeric gels comprising 5.5 % by weight of sodium laureth sulfate. See instant claim 36. The reference also teaches using Carbopol acrylic polymers. See col. 15, line 17.

That the combined teachings of the references suggests that it would have been obvious that a skilled artisan would have been motivated to modify the teaching of Touzan by increasing the amount of sodium laureth sulfate, as motivated by Dixon, because 1) Giacomoni suggests that the addition of NO-synthase inhibitor permits the use of a higher amount of a foaming surfactant; and 2) Dixon teaches a similar polymeric oil-in-water cleansing composition with up to 5.5 % of the same foaming surfactant that is used in Touzan. The skilled artisan would have had a reasonable expectation of successfully producing a stable cleansing composition with higher foaming properties that is still suitable for sensitive skin.

It would have been obvious to one of ordinary skill in the art at the time of the present invention to modify the disclosed formulation of Touzan by adjusting the weight amount of the oil phase, as motivated by the teaching in the specification, because the specification teaches that the composition may contain up to 50 %, and preferably by 40

% of the total weight of the composition. The skilled artisan would have had a reasonable expectation of successfully producing a similarly stable foaming composition.

Claims 28 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Touzan, Giacomoni, and Dixon as applied to claims 13-17, 26, 30-40, 44-49, 54 and 55 as above, and further in view of Schönrock et al. (US 5876737).

Touzan, discussed above, lacks the oil components of instant claims 28 and 29. The reference teaches that the formulation is suitable for sensitive skin. See col. 7, lines 3-5.

Schönrock teaches that the oils of instant claim 28 are advantageously used in formulating cosmetic emulsions, oleogels, hydrodispersions or lipodispersions for treatment of skin irritation. See col. 9, line 33 – col. 10, line 11. The reference also teaches, “mixtures of C12-15 alkyl benzoate and 2-ethylhexyl isostearate, mixtures of C12-15 alkyl benzoate and isotridecyl isononanoate, and mixture of C12-15 alkyl benzoate, 2-ethylhexyl isostearate and isotridecyl isononanoate are particularly advantages.” See col. 10, lines 13-16; instant claim 29. Schönrock also teaches that these can be used in formulations for cleansing the skin or hair. See col. 10, line 66 – col. 11, line 3.

It would have been obvious to one of ordinary skill in the art at the time of the present invention to modify the composition of Touzan by using the oils of Schönrock, as motivated by the latter reference, because 1) both Touzan and Schönrock teach topical cleansing formulations and are concerned with irritable skin; and 2) Schönrock teaches particular types of oils that are suitable for a formulation that is used for

treatment of skin irritation. The skilled artisan would have had a reasonable expectation of successfully producing a similarly stable and safe cleansing composition.

Claims 13-17, 26, 30, 36-40, 52-54, and 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Touzan et al (US 6210656 B1) in view of Giacomoni (US 7083799 B1) and Dixon et al. (US 5869070).

Dixon teaches a skin cleansing and moisturizing composition comprising about 5-30 parts of lipid skin moisturizing agents; 0.3-5 parts of a water dispersible gel forming polymer; and from about 5-30 parts of a synthetic surfactant; and water. See instant claims 13, 36, 52, 53, and 56. The reference specifically teaches that lathering synthetic surfactants are used most preferably from about 10-25 parts. Also contained in the gel emulsion is 1.5% and 2.0% of sodium polyacrylate copolymer, an anionic copolymer of alkylated acrylic acid and esters thereof. See claim 56, (d). The reference also teaches using Carbopol acrylic polymers. See col. 15, line 17. Additives such as vitamins are taught in col. 14, lines 54 – 67; instant claim 56.

With respect to the weight amount of sodium laureth sulfate, Examples 1 and 2 on column 17 show stabilized polymeric gels comprising 5.5 % by weight of sodium laureth sulfate and 2.0 % of sodium lauroyl sarcocinate and 5.5 % of sodium C12/C14 alkyl ether glycerol sulfonate, which meets “one of more” detergent surfactants limitation of instant claim, and would have rendered obvious using more than 10 % of sodium laureth sulfate. See also Table in col. 12, lines 23 – 34; the text in lines 53 – 59.

The new rejection on claims 13-17, 26, 30, and 36-40 in view of this previously cited reference on a different ground is necessitated in order to address the new claims, claims 52 and 53.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 13-17, 26, 30-40, and 44-49 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5, 7-21, 26-29, 31-34, and 40-44 of copending Application No. 10/830,001.

Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of compositions are directed to cleansing emulsion composition comprising sodium laureth sulfate, anionic polymers of acrylic acid or esters, oil phase, and water in overlapping limitations. See '001 claims 1-5, 7, 8; instant claims 13-17, 26, 33-40, and 44. The oils of instant claims 28-29 are defined in the '001 specification, p. 10, [0059]-[0060], as the oils of the copending claims 1 (ii). The at least one active ingredient of claim 26 of the '501 application is also defined in specification, p. 19, [0096]-[0098]. See instant claims 30 and 31. The applications of the

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compositions are also the same. See '001, claims 40-42; instant claims 48-48. With respect claim 49, it is viewed that the compositions of the two applications obviously have the same texture, since they comprise the same components within the overlapping amounts.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

Applicant's arguments filed on April 3, 2007 have been fully considered but they are not persuasive in part and moot in view of new grounds of rejection in part.

Applicants assert that Touzan and Dixon are not combinable due to the differences in the types of the formulations. However, Dixon is cited to show that using more than 5 % of sodium laureth sulfate in a foaming oil-in-water emulsion would have been obvious in cosmetic art. Both Touzan and Dixon are directed to foaming oil-in-water emulsion with gelling/acrylic copolymers. Since Touzan teaches a rather more specific types of formulation, a cream-like foaming composition, it is obvious that a skilled artisan would have selected a gelling agent or viscosity modifier that would provide the desired rheology of the final products. The difference in the types of the gelling agents used in this two prior arts would not have deterred a skilled artisan to modify the amount of the lathering surfactants to make a composition with a desired foaming property.

The fact that a stable mousse is obtained even in the absence of a surfactant does not necessary negate the motivation to produce a composition a higher foaming action. The prior art teaches a range of weight amount of other constituents of the

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emulsion, such as using up to 50 % of oil. Varying the amount of other agents that may affect the foaming property would have obviously required adjusting the amount of lathering surfactants as well.

Conclusion

No claims are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 571-272-8605. The examiner can normally be reached on Monday through Friday, from 8:00AM until 5:30 PM.

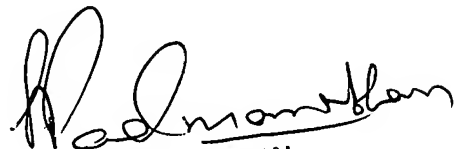
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Gina C. Yu
Patent Examiner



SREENI PADMANABHAN
SUPERVISORY PATENT EXAMINER